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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 SEAN M. PARK, MICHELLE PARK

12 Plaintiffs,

13 vs.

14 WACHOVIA MORTGAGE, FSB,
15 WACHOVIA MORTGAGE
16 CORPORATION, EXECUTIVE TRUST
SERVICES, CHICAGO TITLE
COMPANY PARK CAMINO BRANCH,
SHEPPARD RICHTER, DOES 1-10

17 Defendants.

CASE NO. 10cv1547-WQH-RBB

ORDER

18 HAYES, Judge:

19 The matters before the Court are Plaintiffs' Motion for Leave to File Second Amended
20 Complaint. (ECF No. 83); Plaintiffs' Ex Parte Application for Stay of Expungement of
21 Pendency of Action Pending Appeal (ECF No. 90); Plaintiffs Ex Parte Motion to File
22 Supplemental Reply (ECF No. 99); and Plaintiffs' Ex Parte Motion to Strike Defendants
Surreply Pleading (ECF No. 106).

23 **BACKGROUND**

24 On July 26, 2010, Plaintiffs Sean M. Park and Michelle Park, proceeding pro se,
25 initiated this action by filing a Complaint. (ECF No. 1). Plaintiffs filed an Amended
26 Complaint on August 11, 2010. (ECF No. 3).

27 On August 25, 2010, Well Fargo Bank ("Wells Fargo") filed a Motion to Dismiss.
28 (ECF No. 11).

1 On January 5, 2011, Defendant Wells Fargo filed an Ex Parte Motion to Expunge
2 Notice of Pendency of Action, or Alternatively, to Require Plaintiffs to Post a Bond. (ECF
3 No. 76).

4 On January 12, 2011, this Court issued an Order dismissing each of Plaintiffs's
5 claims against Defendant Wells Fargo and permitting Plaintiffs to file a motion for leave to
6 file a second amended complaint. (ECF No. 78).

7 On January 26, 2011, this Court issued an Order granting Defendants' Ex Parte
8 Motion to Expunge Notice of Pendency of Action and allowing Defendant to file a motion
9 for attorney's fees. (ECF No. 85). On that same day, Plaintiffs filed a Motion for Leave to
10 File Second Amended Complaint. (ECF No. 83).

11 On January 27, 2011, Plaintiffs filed a Notice of Appeal of the Order granting
12 expungement of the lis pendens to the Ninth Circuit Court of Appeals. (ECF No. 86). On
13 that same day, Plaintiffs filed an Ex Parte Application for Stay of Expungement of
14 Pendency of Action Pending Appeal.¹ (ECF No. 90).

15 On February 22, 2011, Plaintiffs filed an Ex Parte Motion to File Supplemental
16 Reply.² (ECF No. 99). On March 11, 2011, Plaintiffs filed an Ex Parte Motion to Strike
17 Defendants Surreply Pleading.³ (ECF No. 106).

18 On March 16, 2011, the Ninth Circuit dismissed the appeal for lack of jurisdiction.
19 (ECF No. 107). On April 7, 2011, mandate was issued by the Ninth Circuit. (ECF No.
20 110).

21 DISCUSSION

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23 ¹ Plaintiffs requested a stay of the expungement of lis pendens pending the Ninth
24 Circuit's decision regarding Plaintiffs' appeal. On March 16, 2011, the Ninth Circuit
25 dismissed the appeal for lack of jurisdiction and mandate was issued. Plaintiffs' Ex Parte
Application for Stay of Expungement of Pendency of Action Pending Appeal (ECF No. 90)
is DENIED as moot.

26 ² Plaintiffs' Ex Parte Motion to File Supplemental Reply (ECF No. 99) is GRANTED.
The Court will consider Plaintiffs' supplemental Reply.

27 ³ "The court may strike from a pleading an insufficient defense or any redundant,
28 immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12 (f). There are no grounds
to strike the Surreply. Plaintiffs' Ex Parte Motion to Strike Defendants Surreply (ECF No.
106) is DENIED.

1 Rule 15 of the Federal Rules of Civil Procedure mandates that the court “should
2 freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a). “This policy
3 is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
4 1048, 1051 (9th Cir. 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962),
5 the Supreme Court offered several factors for district courts to consider in deciding whether
6 to grant a motion to amend under Rule 15(a):

7 In the absence of any apparent or declared reason—such as undue
8 delay, bad faith or dilatory motive on the part of the movant,
9 repeated failure to cure deficiencies by amendments previously
10 allowed, undue prejudice to the opposing party by virtue of
11 allowance of the amendment, futility of amendment, etc.—the leave
12 sought should, as the rules require, be ‘freely given.’

13 *Foman*, 371 U.S. at 182; see also *Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th
14 Cir. 2004) (citing *Foman* factors).

15 “Not all of the [*Foman*] factors merit equal weight. As this circuit and others have
16 held, it is the consideration of prejudice to the opposing party that carries the greatest
17 weight.” *Eminence Capital*, 316 F.3d at 1052 (citations omitted). “The party opposing
18 amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*, 833
19 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing of any of the
20 remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting
21 leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

22 Plaintiffs have filed a proposed second amended complaint that adds Deborah
23 Eisenbraun, sales agent for Wachovia Mortgage, FSB; Tiffany Duke, loan counselor for
24 Wachovia Mortgage Corp.; and Attorney Mark G. Rackers, who represents Defendant Well
25 Fargo Bank in this matter, as defendants.

26 Plaintiffs contend that the proposed second amended complaint “in no way alters the
27 underlying claims set forth in the original Complaint nor otherwise substantially alters the
28 content of the original Complaint, other than causes of action relating to events that
occurred subsequent to filing of the original complaint.” (ECF No. 83 at 2). Plaintiffs
contend that the proposed second amended complaint “adds additional details provided by

1 exhaustive legal research, supportive audits and investigat[ions], and plaintiffs'
2 consultations with expert witnesses” *Id.*

3 Defendant contends that “(1) Plaintiff’s attempt to add new defendants is done in
4 bad faith; (2) Plaintiffs fail to cure the fatal flaws of their first amended complaint; and (3)
5 amendment is futile.” (ECF No. 97 at 5). Defendant contends that Plaintiffs have not
6 alleged any factual basis to allege a claim against these new defendants and “is simply an
7 attempt to harass and intimidate these individuals.” *Id.* at 6. Defendant contends that
8 Plaintiff’s claims are defective, and Plaintiff has already had two prior attempts at
9 sufficiently stating a claim.

10 After consideration of the submissions of the parties, the Court concludes that
11 Defendant has not made showing of the *Foman* factors to sufficient overcome the
12 presumption under Rule 15(a) in favor of granting leave to amend. *See Eminence Capital*,
13 316 F.3d at 1052. The Court will defer consideration of any challenge to the merits of the
14 proposed third amended complaint until after leave to amend is granted and the amended
15 pleading is filed. *See Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-4708, 2006
16 WL 3093812, at *2 (N.D. Cal., Oct. 31, 2006) (“In view of Rule 15(a)’s permissive
17 standard, courts ordinarily defer consideration of challenges to the merits of a proposed
18 amended pleading until after leave to amend is granted and the amended pleading is
19 filed.”).


20 CONCLUSION

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22 IT IS HEREBY ORDERED that Plaintiffs’ Motion for Leave to File Second
23 Amended Complaint. (ECF No. 83) is GRANTED. No later than fifteen days from the
24 date of this Order, Plaintiffs shall file the proposed Second Amended Complaint attached as
25 Exhibit I to Plaintiffs’ Motion. Plaintiffs’ Ex Parte Application for Stay of Expungement
26 of Pendency of Action Pending Appeal (ECF No. 90) is DENIED as moot. Plaintiffs’ Ex
27 Parte Motion to File Supplemental Reply (ECF No. 99) is GRANTED.

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1 Plaintiffs' Ex Parte Motion to Strike Defendants Surreply (ECF No. 106) is DENIED.

2 DATED: April 13, 2011

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5 **WILLIAM Q. HAYES**
6 United States District Judge
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